United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2147

To be argued by:
MARK I. FISHMAN

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

No. 74-2147

HARRY ERNEST RUBENS and JEANNE RUBENS,
Plaintiff-Appellants,

—against—

NEW YORK STOCK EXCHANGE, INC., et al.,
Defendant-Appellees.

BRIEF FOR DEFENDANT-APPELLEE KIDDER, PEABODY & CO. INCORPORATED

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Statement of the Case

Plaintiffs appeal from a final judgment entered July 24, 1974 pursuant to two orders of the United States District Court for the Southern District of New York (Brieant, *J.*). The first order, entered March 18, 1974, granted summary judgment to defendant Kidder, Peabody & Co. Incorporated ("Kidder, Peabody") upon an award rendered in a New York Stock Exchange arbitration proceeding (App. 144-152).* The second, entered July 16, 1974, ordered dismissal of the complaint as to defendants other than Kidder, Peabody and directed the entry of final judgment (App. 223-225). Plaintiffs also purport to appeal from a prior order staying this action pending the disposition of arbitration proceedings which were already in progress at the time of commencement of this action (App. 99-101).

* References to "App." are to pages of the Joint Appendix.

Question Presented

Was summary judgment properly granted to defendant-appellee Kidder, Peabody upon an arbitration award where the claims asserted in the action in the United States District Court had already been submitted in writing to arbitration, where two arbitration sessions had already been conducted prior to the commencement of the action and where an arbitration award was rendered shortly thereafter which ruled in favor of Kidder, Peabody and adjudicated the claims asserted in the District Court by plaintiffs?

Facts and Prior Proceedings

Plaintiffs complain, in essence, of the allegedly improper imposition of interest charges by Kidder, Peabody with respect to certain transactions generally characterized as "short sales against the box" which plaintiffs effected through their margin account at Kidder, Peabody. The nature of the transactions and the interest charges to plaintiffs are not central to the issue before the Court on this appeal. They are, however, fully described in the record (App. 13-20).

In September, 1970, close to three years after the first interest charges were incurred by plaintiffs and debited to their account (App. 18), plaintiffs each commenced an action for $300 against Kidder, Peabody in the Small Claims Part of the Civil Court of the City of New York, County of New York (App. 18, 56, 57). Plaintiffs did not invoke the federal securities laws and sought only the return of interest which they had paid (App. 56, 57). In November, 1970 the Civil Court stayed both actions pending arbitration pursuant to written agreements among the parties (App. 24-27, 59, 133-136).

In accordance with the written agreements which permitted plaintiffs an election of arbitration forums between the American Arbitration Association and the New York Stock Exchange (App. 25, 27, 133), plaintiffs, one of whom is an attorney (App. 13), eventually filed their claims with the Arbitration Director of the New York Stock Exchange. By this time plaintiffs were no longer each seeking $300 but instead prayed for an aggregate award of $9,950 (App. 73-74). The Submission to arbitration was executed by all parties in November, 1972 (App. 76-88) and the arbitration hearings commenced on May 31, 1973 before a panel of five arbitrators, a majority of whom were not engaged in the securities business (App. 20, 77, 81, 78). Following the second arbitration session on June 5, 1973 the parties and arbitrators agreed to October 17, 1973 as the next hearing date (App. 20).

On August 15, 1973 plaintiffs, asserting the same claims, based on the same transactions, commenced this action in the United States District Court, ostensibly seeking relief under the Securities Exchange Act of 1934 (App. iii, 1-10) even though their entire controversy with Kidder, Peabody was already being arbitrated and two arbitration sessions had already been conducted. On October 9, 1973 the District Court ordered a stay of all proceedings until after completion of the arbitration (App. 99-101). Eight days later the arbitrators rendered their award in favor of Kidder, Peabody, and against plaintiffs (App. 107-108). Plaintiffs did not seek to vacate the award.

On the basis of the arbitrators' award Kidder, Peabody moved for summary judgment and, alternatively, moved for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint for failure to state a claim upon which relief can be granted (App. 102). Judge Brieant rendered a memorandum and

order on March 18, 1974 (App. 144-152) in which he granted summary judgment to Kidder, Peabody and stated, alternatively, that "plaintiffs' allegations of fraud appear insufficient to support a Rule 10b-5 action" (App. 150-151). Final judgment was entered for all defendants following Judge Brieant's July 16, 1974 memorandum and order granting summary judgment to defendants Merrill Lynch, Pierce, Fenner & Smith Incorporated and New York Stock Exchange, Inc. (App. 223-225).

ARGUMENT

The case of *Wilko* v. *Swan,* 346 U.S. 427 (1953), and its progeny, upon which plaintiffs place their principal reliance, while invalidating certain agreements to arbitrate *future* disputes arising under the federal securities laws, do not purport to govern cases where, as in the case at bar, an *existing* dispute has been submitted to arbitration. *Wilko,* therefore, is inapplicable. *Moran* v. *Paine, Webber, Jackson & Curtis,* 389 F.2d 242, 246 (3d Cir. 1968).

In this case plaintiffs knowingly and voluntarily submitted their existing dispute with Kidder, Peabody to New York Stock Exchange arbitration, even though at least two other forums were equally available to them. Following the stay of their small claims actions, plaintiffs chose not to appeal from that order. Under their written agreements with Kidder, Peabody plaintiffs could have elected to arbitrate before the American Arbitration Association but did not do so. Moreover, to the extent that they were asserting a valid Securities Exchange Act claim, plaintiffs still could have commenced an action in a United States District Court rather than submit to arbitration. Instead, plaintiffs elected first to initiate and submit their claims to

arbitration and not to commence a federal action until two arbitration sessions had already been held.

As to plaintiffs' appeal from the District Court's stay of their federal action until the conclusion of a then ongoing arbitration, the stay was not precluded by *Wilko,* since the arbitration had already commenced before plaintiffs sought to avail themselves of a securities law remedy. This case indeed bears little, if any, resemblance to *Wilko,* which held that a federal action pending under the securities laws could not be stayed for the purpose of commencing a future arbitration. Plaintiffs in this action had already, by initiating and submitting to arbitration, waived whatever rights they might have had to prosecute upon the same claims a purported Exchange Act action in the District Court. "[T]he remedial right of access to the court after an active controversy has arisen can be waived knowingly in favor of arbitration." *Pearlstein* v. *Scudder & German,* 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied,* 401 U.S. 1013 (1971); see *Moran, supra,* at 246.

Moreover, it is difficult to glean any prejudice which could conceivably have resulted to plaintiffs from the granting of a brief stay of the District Court action until a pending arbitration could be concluded. The granting of a stay is explicitly authorized by the Federal Arbitration Act, 9 U.S.C. § 3. It is doubtful in any event that plaintiffs could have fully litigated and brought to judgment their purported federal claims during the eight days between the stay order and the conclusion of the arbitration, and there is no way that plaintiffs could somehow have averted the rendering of the arbitration award if the federal action had not been stayed.

Finally, there is no substance to plaintiffs' argument that *Wilko* makes unlawful all arbitration agreements be-

tween stockbrokers and their customers. All that *Wilko* holds is that such agreements are unenforceable with respect to future claims arising under the federal securities laws. Here, as previously noted, the claims which plaintiffs asserted in the state court were purely common law claims and there was no mention in plaintiffs' complaint of the federal securities laws. It was not until the arbitration was almost concluded that plaintiffs first invoked the federal securities laws by bringing suit in the District Court. By that time, plaintiffs had waived whatever right they ever had to resist arbitration and, following the arbitration award which adjudicated plaintiffs' claims, summary judgment dismissing the complaint was the only appropriate procedure.

Because the basis for dismissal of the complaint against Kidder, Peabody was the arbitration award and not plaintiffs' failure adequately to state a cause of action, even though Judge Brieant recognized the validity of the latter ground as well, we shall not brief in this Court plaintiffs' failure adequately to plead a cause of action upon which Exchange Act relief could have been granted.

CONCLUSION

The order granting summary judgment to defendant Kidder, Peabody & Co. Incorporated should be affirmed.

Respectfully submitted,

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